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No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIE WILSON AND MORRIS GRIFFIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 255 F. 2d 686. The opinion of the District Court (Pet. App. B) is reported at 158 F. Supp. 442.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1958. A petition for rehearing was denied on July 30, 1958. The petition for a writ of certiorari was filed on August 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was probable cause to stop and search the automobile in which petitioners were transporting bootleg liquor.

2. Whether the trial court erred in denying petitioners' motion for a continuance when it set the case down for retrial on the same day it had granted a mistrial.

3. Whether the petitioners were prejudiced by a letter from the United States District Judge and a directive from the Administrative Office of the United States Courts to the jury commissioner of the Middle District of Alabama informing him of recent changes in federal law relating to qualifications of jurors in federal courts.

4. Whether Congress may fix qualifications for federal jurors without regard to state laws.

STATEMENT

On November 20, 1957, in the United States District Court for the Middle District of Alabama petitioners were found guilty on three counts of a four-count indictment charging them with the possession and concealment of liquor upon which the federal tax had not been paid (26 U. S. C., Supp. V, §§ 5008 (b), 5632, 5691, 7206 (4)) (R. 151). Each of the petitioners was sentenced to 18 months' imprisonment (R. 158, 160). On appeal the convictions were affirmed (Pet. App. A). 255 F. 2d 686.

1. The case was called for trial on the morning of November 20, 1957 (R. 57). The petitioners pleaded not guilty, a jury was selected and qualified, testimony

was taken and the case proceeded to the point of closing argument by the counsel to the jury. Neither of the petitioners had testified during the trial and during the argument to the jury the United States Attorney stated that "There is no denial in this case * * *. There is nobody that has come here * * *" (R. 57). Petitioners objected and the trial court declared a mistrial at approximately 11:15 a. m. The case was reset for trial at 1:30 p. m. the same day (R. 47, 58). The petitioners objected and filed a motion for a continuance which was denied (R. 47–49, 59). Another jury was qualified and selected at 1:30 p. m. that day (R. 58–80). All the jurors who had sat on the first case were disqualified by the court and all the jurors who had heard the testimony or argument or who had heard the testimony or arguments discussed were declared by the court to be disqualified (Pet. App. B, "A"; R. 63, 66, 67).

2. The evidence for the government showed that on August 26, 1957, two agents of the Alcohol and Tobacco Tax Unit of the Treasury Department, while driving along an Alabama highway, spotted an automobile that appeared to be heavily loaded, the rear end of the car being extremely low (R. 83, 84, 112–113). The agents turned their car around and pulled abreast of the heavily loaded car (R. 84). One of the agents recognized the man in the right front seat as Morris Griffin, whom he knew to have a record and reputation as a bootlegger (R. 84–88, 93). The other agent recognized the driver as one of four brothers, three of whom were reputed to be dealing in moonshine whiskey (R. 113–114, 122–124). After the men

were recognized, the agents turned on the siren of their car and ultimately forced the car to halt (R. 86, 114). Petitioner Griffin ran away (R. 87). In the automobile the agents found 75 gallons of non-tax-paid whiskey (R. 98–99). Petitioner Wilson was taken into custody at the time (R. 110).

Before trial, both petitioners filed a motion seeking to suppress the evidence obtained by the agents (R. 3–4), and during the trial the petitioners repeatedly objected to the introduction of testimony concerning the 75 gallons of whiskey (R. 88, 89, 97, 109). The trial court denied petitioners' motion concluding that there was probable cause to stop and search the automobile (R. 44–47).

ARGUMENT

1. Petitioners' argument that there was insufficient probable cause to stop and search the automobile without a warrant is based on the assumption that the search started when the agents, seeing the heavily laden car, decided to follow it (Pet. 8–10). The evidence is clear, however, that the agents did nothing which could be construed as the start of a search until after they had recognized Griffin as the passenger, and the driver as a member of a bootlegging family. They each testified that it was only after that recognition that they sounded their siren. Thus, by the time the agents took any action which could be construed as the beginning of a search, they knew, not only that the rear of the car was very low, but that known dealers in illegal liquor were in the car. By the time they brought the car to a halt, they had the additional fact that the occupants refused to obey the

siren signal. And before the actual search, there was the further fact that Griffin fled from the agents. The courts below were justified in concluding that the facts known to the agents were sufficient probable cause to request the car to stop, and that by the time of the search there was sufficient probable cause for the search and seizure. *Brinegar* v. *United States*, 338 U. S. 160; *Carroll* v. *United States*, 267 U. S. 132; *Husty* v. *United States*, 282 U. S. 694.

2. Petitioners contend that the trial court erred in not granting their motion for a continuance made during the short interval between the two trials (Pet. 10).

The only reasons given by petitioners for the requested continuance were (1) that unless a new venire was drawn up they might be prejudiced if some of the jurors who had heard testimony in the first trial or who had heard the circumstances surrounding the mistrial remained on the panel, and (2) that the petitioners might be prejudiced if some of the jurors previously challenged or struck by the petitioners remained on the panel (R. 47–49).

As to petitioners' first reason, the record clearly shows that any possibility of prejudice to the petitioners was removed by the trial court's action. Before the second trial began, the judge disqualified for jury service any juror who sat on the first case, any juror who heard any of the testimony or arguments in the first case and any juror who had discussed the testimony or arguments (Pet. App. A; Pet. App. B, "A"). Thus, the parties to the case were, after an extensive *voir dire* examination by the court, tendered

a venire of jurors that had not heard or discussed any of the testimony, arguments or reasons for the mistrial in the first case. As to petitioners' second point, it suffices to say that if the petitioners thought they would be prejudiced by the presence on the jury of previously challenged or struck jurors they were perfectly free to challenge or strike the jurors a second time. The record shows that petitioners did excuse six jurors before the second trial and that petitioners' attorney said that he was satisfied with the jury before the second trial began (R. 77–80).

3. During the month of September, 1957, the Administrative Office of the United States Courts issued a bulletin to United States Jury Commissioners calling their attention to three bills relating to jury service that had been passed by the 85th Congress (Pet. App. B, "B"; R. 220–222). The trial judge also sent a letter to the jury commissioner in his district calling his attention to the fact that Congress had changed the law pertaining to the qualifications of federal jurors and that, under federal law, women were eligible for service. Neither of the documents did more than inform the commissioner of the law governing his selection. They did not, as petitioners contend, keep the commissioner from selecting a jury (Pet. App. B, "C"; R. 218–220). In *United States* v. *Murphy*, 224 Fed. 554, on which petitioners rely (Pet. 13–15), actual selection of jurors was by an Assistant United States Attorney. Here the selection was made by the jury commissioners themselves.

4. After receiving notice of the passage of Public Law 85–315 which permitted women to serve as fed-

eral jurors, the jury commissioners placed the names of qualified women in the jury box, and some of the names were drawn for service on the present case. Alabama law declares that only male citizens are eligible for jury duty. (See Section 21 of Title 30 of the 1940 Code of Alabama.) Petitioners contend that the federal statute is unconstitutional on the ground that the Sixth Amendment's requirement of trial "by an impartial jury of the State and district wherein the crime shall have been committed * * *" means an impartial jury qualified under the law of the state wherein the crime was committed. The words of the Sixth Amendment that an accused shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed" are only geographical qualifications of the jury, guaranteeing that the defendant will be tried by the inhabitants of the state and political subdivision of that state where the crime was committed. See *Salinger* v. *Loisel*, 265 U. S. 224, 232; *Haas* v. *Henkel*, 216 U. S. 462, 473, 474. The Sixth Amendment says nothing as to what law, federal or state, is to be administered in the selection of the jury. Congress, which has power to establish federal courts, define federal crimes, and determine the procedure to be followed, also has power to fix the qualifications for jurors in federal courts. See *Charge to Grand Jury, Treason*, 30 Fed. Cas. 1039, 1040 (No. 18,273; D. Mass.); Cf. *Brickey* v. *United States*, 123 F. 2d 341 (C. A. 8).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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